

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

The United States of America
for the use of Frattalone Companies, Inc.,

Civil No. 16-cv-648

Plaintiffs,

vs.

**COMPLAINT
AND JURY DEMAND**

KEPA – TCI JV LLC, a Wisconsin limited
liability company; Hartford Fire Insurance
Company; a Connecticut insurance
company

Defendants.

INTRODUCTION

The United States of America contracted with KEPA - TCI JV LLC (“KEPA”) to serve as the prime contractor and provide labor and materials on the Ft McCoy ECS – TEMF/Warehouse project (the “TEMF Project”) and the Ft. McCoy Central Issue Facility project (the “CIF Project”). KEPA subcontracted a portion of the labor and materials on the TEMF Project and CIF Project, including the earthwork and utilities labor and materials, to TCI Architects/Engineers/Contractor, Inc. (“TCI”), and TCI subcontracted the earthwork and utilities labor and materials for the TEMF Project and CIF Project to Plaintiff Frattalone Companies, Inc. (“Frattalone”). KEPA secured a payment bond from Hartford Fire Insurance Company (“Hartford”) as required by the Miller Act, 40 U.S.C. §§ 3131-3134, which protects subcontractors who perform work

for prime contractors or subcontractors of the prime contractor when those prime contractors or their subcontractors later fail to pay.

Frattalone performed its work. KEPA and TCI failed to pay Frattalone, and Hartford failed to pay Frattalone pursuant to the payment bond. Frattalone now brings this Complaint and alleges as follows:

JURISDICTION

1. This Court has subject-matter jurisdiction over this action under 40 U.S.C. § 3133 and under 28 U.S.C. §§ 1331 and 1352. It has supplemental and diversity jurisdiction over the state-law claims under 28 U.S.C. § 1367 and 28 U.S.C. § 1332, respectively.

VENUE

2. Venue is proper in this district and division under 40 U.S.C. § 3133(b)(3)(B) because the subcontract at issue and the work performed pursuant to the same was in Monroe County, Wisconsin.

PARTIES

3. Frattalone is a Minnesota corporation with a principal place of business in Little Canada, Minnesota.

4. Defendant KEPA is a Wisconsin limited liability company with a principal place of business in Milwaukee, Wisconsin.

5. Defendant Hartford is a Connecticut company with a principal place of business in Hartford, Connecticut. Hartford is registered to do business in the State of Wisconsin.

FACTS

KEPA's Prime Contract and Miller Act Bond

6. On or about June 13, 2013, the United States Army Corps of Engineers – Louisville District (“COE”) entered into a Contract No. W912QR-13-C-0018 with KEPA to serve as the prime contractor for construction of the TEMF Project (“KEPA TEMF Prime Contract”).

7. On or about June 14, 2013, the COE entered into a Contract No. W912QR-13-C-0016 with KEPA to serve as the prime contractor for construction of the CIF Project (“KEPA CIF Prime Contract”).

8. KEPA secured performance and payment bonds for the TEMF Project and CIF Project as required by the Miller Act, 28 U.S.C. § 1331.

9. Specifically, on or about June 17, 2013, KEPA, as principal, and Hartford, as surety, executed a Miller Act Payment Bond numbered 41BCSGL8350 with a penal sum in the amount of \$19,120,600.00 for the KEPA TEMF Prime Contract (“TEMF Payment Bond”). A true and correct copy of the TEMF Payment Bond is attached to and incorporated by reference into this Complaint as **Exhibit A**.

10. On or about June 17, 2013, KEPA, as principal, and Hartford, as surety, also executed a Miller Act Payment Bond numbered 41BCSGL8351 with a penal sum in the amount of \$9,312,998.00 for the KEPA CIF Prime Contract (“CIF Payment Bond”). A true and correct copy of the CIF Payment Bond is attached to and incorporated by reference into this Complaint as **Exhibit B**.

The TEMF Payment Bond Protects Frattalone

11. Through the TEMF Payment Bond, Hartford agreed to be bound jointly and severally with KEPA to make payment to all persons who furnished labor, material, or both in the prosecution of the work specified in the KEPA TEMF Prime Contract, in the event that KEPA failed to make prompt payment to such persons. The TEMF Payment Bond protects all persons having a direct relationship with KEPA or a subcontractor of KEPA.

12. TCI was a subcontractor of KEPA on the TEMF Project.

13. Frattalone has a direct contractual relationship with TCI for furnishing labor and material in prosecution of the KEPA TEMF Prime Contract. Specifically, through its subcontract dated September 3, 2013 (“the TCI/Frattalone TEMF Subcontract”), TCI contracted with Frattalone to provide the “Earthwork and Utilities” required for the KEPA TEMF Prime Contract at the TEMF Project.

14. The TCI/Frattalone TEMF Subcontract was for an original amount of \$2,260,310.00. A true and correct copy of the TCI/Frattalone TEMF Subcontract is attached to and incorporated by reference into this Complaint as **Exhibit C**. The subcontract amount was increased to \$2,458,223.68 after the approval of modifications valued at \$197,913.68.

15. Frattalone began work on the TEMF Project on or about November 9, 2013.

16. Frattalone completed its work on the TEMF Project on or about November 14, 2015.

Frattalone Completed its Contractual Work on the TEMF Project and TCI and KEPA Failed to Pay

17. Frattalone completed the work required for the TCI/Frattalone TEMF Subcontract and subsequent approved modifications and additional work, all of which work was furnished in the prosecution of the KEPA TEMF Prime Contract with KEPA's and TCI's knowledge and approval.

18. On or about July 10, 2015, TCI filed for Receivership protection pursuant to Wisconsin Statutes Chapter 128.

19. As of October 6, 2015, TCI had paid Frattalone \$2,155,770.64 of the \$2,458,223.68, leaving a balance due to Frattalone of \$302,453.04, plus interest and costs.

20. On October 6, 2015, Frattalone submitted its notice of claim on the KEPA TEMF Payment Bond in the amount of \$302,453.04, plus interest and costs to KEPA and Hartford for its work at the TEMF Project.

21. TCI subsequently made payments to Frattalone totaling \$245,589.33 on the TEMF Project, leaving a balance outstanding to Frattalone in the amount of \$56,863.71, plus interest and costs.

22. The COE has paid KEPA for services provided by Frattalone at the TEMF Project.

23. Despite repeated requests, KEPA and Hartford have failed to pay Frattalone and, thus, denied Frattalone's claim on the TEMF Project.

Frattalone Completed its Contractual Work on the CIF Project and TCI and KEPA Failed to Pay

24. Frattalone also has a direct contractual relationship with TCI for furnishing labor and material in prosecution of the KEPA CIF Prime Contract. Specifically, through its subcontract dated September 10, 2013 (“the TCI/Frattalone CIF Subcontract”), TCI contracted with Frattalone to provide the “Earthwork and Utilities” required for the KEPA CIF Prime Contract at the CIF Project.

25. The TCI/Frattalone CIF Subcontract was for an original amount of \$348,995.00. A true and correct copy of the TCI/Frattalone CIF Subcontract is attached to and incorporated by reference into this Complaint as **Exhibit D**. The subcontract amount was increased to \$393,469.25 after the approval of modifications valued at \$44,474.25.

26. Frattalone began work on the CIF Project on or about September 23, 2013.

27. Frattalone completed its work on the CIF Project on or about August 6, 2015.

28. Frattalone completed the work required for the TCI/Frattalone CIF Subcontract and subsequent approved modifications and additional work, all of which work was furnished in the prosecution of the KEPA CIF Prime Contract with KEPA’s and TCI’s knowledge and approval.

29. As of October 6, 2015, TCI had paid Frattalone \$348,745.50 of the \$393,469.25, leaving a balance due to Frattalone of \$44,723.75, plus interest and costs.

30. On October 6, 2015, Frattalone submitted its notice of claim on the KEPA CIF Payment Bond in the amount of \$44,723.75, plus interest and costs to KEPA and Hartford for its work at the CIF Project.

31. TCI subsequently made payments to Frattalone totaling \$15,258.50 on the CIF Project, leaving a balance outstanding to Frattalone in the amount of \$29,465.25, including \$23,491.00 of retainage, plus interest and costs.

32. The COE has paid KEPA for services provided by Frattalone at the CIF Project.

33. KEPA failed and/or refused to pay TCI for Frattalone's work on the CIF Project.

COUNT I
MILLER ACT CLAIM ON THE KEPA TEMF PAYMENT BOND
(Hartford and KEPA)

34. The United States for the use of Frattalone and Frattalone re-allege each of the foregoing paragraphs above as if fully set forth in this count.

35. More than 90 days and less than one year has passed since Frattalone last performed work on the TEMF Project under the TCI/Frattalone TEMF Subcontract. (*See* 40 U.S.C. §§ 3131(b)(1), (b)(4).)

36. KEPA and TCI failed to pay Frattalone for the all work performed under the TCI/Frattalone TEMF Subcontract.

37. Hartford and KEPA are obligated, pursuant to the KEPA TEMF Payment Bond, to pay Frattalone for the labor, materials, and services Frattalone furnished in

prosecution of the work provided for in the KEPA TEMF Prime Contract, and for which KEPA and TCI failed to make payment.

38. Hartford and KEPA failed to fulfill their obligations and breached the KEPA TEMF Payment Bond by failing to pay Frattalone for the labor and materials that Frattalone furnished in prosecution of the work provided for in the KEPA TEMF Prime Contract, and for which KEPA and TCI failed to make payment.

39. Frattalone is entitled to payment from Hartford and KEPA in the amount of \$56,863.71 pursuant to the Miller Act, 40 U.S.C. § 3133.

COUNT II
BREACH OF TEMF AND CIF CONTRACTS
(KEPA)

40. Frattalone re-alleges each of the foregoing paragraphs above as if fully set forth in this count.

41. Frattalone performed its obligations under the TCI/Frattalone TEMF Subcontract and TCI/Frattalone CIF Subcontract.

42. KEPA breached its subcontract with TCI by failing and/or refusing to pay TCI in full for labor and materials provided by Frattalone in prosecution of the KEPA TEMF Prime Contract and KEPA CIF Prime Contract.

43. Frattalone is a third-party beneficiary of the KEPA/TCI subcontract agreement in that Frattalone provided the earthwork and utilities labor and materials required by the KEPA/TCI subcontract in exchange for payment for these labor and materials as required by the KEPA/TCI subcontract.

44. Frattalone, a third-party beneficiary to the KEPA/TCI subcontract, suffered damages in excess of \$75,000 as a direct and proximate result of KEPA's breach of the KEPA/TCI subcontract.

COUNT III
UNJUST ENRICHMENT
(KEPA)

45. Frattalone re-alleges each of the foregoing paragraphs above as if fully set forth in this count.

46. KEPA accepted work from Frattalone that was incorporated into the TEMF Project and CIF Project. KEPA has been paid by the COE for all or a portion of that work. It would be unjust for KEPA to retain the benefit of Frattalone's work without paying Frattalone.

47. Frattalone is entitled to payment by KEPA in an amount greater than \$75,000, plus interest, to prevent unjust enrichment.

COUNT IV
PROMISSORY ESTOPPEL AND EQUITABLE ESTOPPEL
(KEPA)

48. Frattalone re-alleges each of the foregoing paragraphs above as if fully set forth in this count.

49. KEPA induced TCI and Frattalone to perform work based on its promises to pay for such work.

50. Frattalone performed its work and provided labor and materials on the TEMF Project and CIF Project in reasonable reliance on KEPA's promises.

51. KEPA is promissorily estopped and/or equitably estopped from refusing to pay for Frattalone's work, which KEPA ordered, accepted and promised to pay for.

52. Frattalone is entitled to payment by KEPA of an amount greater than \$75,000.00, plus interest, pursuant to the doctrines of promissory estoppel and/or equitable estoppel.

PRAYER FOR RELIEF

WHEREFORE, Frattalone and the United States of America, for the use of Frattalone, demand judgment against KEPA – TCI JV LLC and Hartford Fire Insurance Company as follows:

1. Joint and several judgment against Hartford and KEPA on the KEPA TEMF Payment Bond, plus interest as provided by law;
2. Judgment against KEPA for contract damages in an amount in excess of \$75,000, to be proven at trial;
3. An award of prejudgment interest at the rate of five percent (5%) pursuant to Wis. Stat. §138.04;
4. Equitable restitution in excess of \$75,000 for the reasonable value of the labor, services, and materials that Frattalone provided to KEPA, from which KEPA benefited, and for which KEPA has failed and refused to pay Frattalone;
5. For attorneys' fees, interest, costs and disbursements in this action; and,
6. For all such other and further relief as the Court deems just and proper.

Dated this 22nd day of September, 2016. BEST & FLANAGAN LLP

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DEMAND FOR JURY TRIAL

Frattalone hereby demands a trial by jury.

Dated this 22nd day of September, 2016. BEST & FLANAGAN LLP

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